

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HENRY GARTH RAY,

Defendant-Appellant.

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UNPUBLISHED

May 13, 2003

No. 234090

Shiawassee Circuit Court

LC No. 00-4988-FC

Before: Talbot, P.J., and White and Murray, JJ.

PER CURIAM.

Defendant was charged with armed robbery, MCL 750.529, and conspiracy to commit armed robbery, MCL 750.529. He was tried before a jury and found guilty on both counts. The trial court subsequently sentenced defendant, as a third habitual offender, MCL 769.12, to two concurrent terms of forty-two to seventy-five years in prison. He now appeals as of right, and we affirm.

Defendant first argues that he is entitled to a new trial on the basis that Kevin Hopkins, who testified against defendant during the trial, recanted his testimony after defendant was convicted.<sup>1</sup> In *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994) we held that:

The discovery that testimony introduced at trial was perjured may be grounds for a new trial. In order to merit a new trial on the basis of such a discovery, a defendant must show that the evidence (1) is newly discovered, (2) is not merely cumulative, (3) would probably have caused a different result, and was not discoverable and producible at trial with reasonable diligence. [Citations omitted.]

In order to find that there is a reasonable probability that the result of the proceeding would have been different, we must conclude that there “is a probability sufficient to undermine confidence in the outcome.” *People v Lester*, 232 Mich App 262, 280 n 11; 591 NW2d 267 (1998).

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<sup>1</sup> Hopkins was also charged with armed robbery and conspiracy to commit armed robbery, but he entered into a plea agreement.

In this case, we conclude that the trial court did not abuse its discretion in denying defendant's motion for a new trial. *Mechura, supra* at 483. Although the letter from Hopkins is arguably new evidence, we find that the admission of this evidence would not likely have caused a different result in the trial. Initially, we note that throughout the course of trial, defendant presented argument and testimony to establish that Hopkins was a liar, that he had an incentive to point the finger at defendant, that he was mad at defendant, and that Hopkins' testimony about the events on the evening of the robbery were contradictory and unclear. Hence, defense counsel had already painted a picture to the jury that there were many reasons why they should not believe the testimony of Hopkins. Additionally, there was ample evidence in the record, independent of Hopkins' testimony, on which the jury could conclude beyond a reasonable doubt that defendant was guilty of the crimes charged. Specifically, the jury was presented with the testimony of Shayne Kelly, the assistant store manager and victim on the night of the robbery. Kelly positively identified defendant as one of the two assailants. Furthermore, the jury heard from Amanda Poppiti, the girlfriend of Hopkins, whose testimony also implicated both Hopkins and defendant in the robbery.

Additionally, we note that the "recanting testimony" submitted with the motion was not in the form of an affidavit, *People v Burkes*, 30 Mich App 102, 103; 186 NW2d 18 (1971), and although Hopkins testified at the hearing on defendant's motion for a new trial, he specifically refused to answer any questions about the truth of the contents of the letter and invoked his Fifth Amendment right against self-incrimination. Although Hopkins did testify that he wrote the letter because "it needed to be done," he never explained what he meant by that statement and, as noted, specifically exercised his right against self-incrimination when asked if his trial testimony was true. For these reasons, we conclude that the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Defendant next argues that he was denied the effective assistance of counsel when his trial counsel failed to effectively cross-examine Poppiti. Because defendant never raised this argument in a motion for a new trial or for a *Ginther*<sup>2</sup> hearing, this issue is reviewed for errors apparent on the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). To establish a denial of effective assistance of counsel, a defendant must prove that his counsel's performance was deficient in that, under an objective standard of reasonableness, defendant was denied his Sixth Amendment right to counsel. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). The deficiency that defendant must establish must be so prejudicial to defendant that, but for counsel's error, the result of the proceedings would have been different. *Id.* The effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). Further, it is well settled that this Court will not second-guess counsel's trial tactics. *People v Williams*, 240 Mich App 316, 331-332; 614 NW2d 647 (2000).

We conclude that defendant has failed to establish that he received the ineffective assistance of counsel as guaranteed by the Constitution. First, as to the cross-examination of Poppiti regarding defendant's use of marijuana, the prosecution correctly points out that defense counsel's eliciting this testimony opened an avenue of argument as to why defendant

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<sup>2</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

admonished Hopkins in jail. Specifically, it allowed defense counsel to argue to the jury that defendant was upset with Hopkins not because he was concerned that he would talk about the armed robbery, but about the possession of marijuana. Although this tactic did not prove to sway the jury, it is certainly a matter falling within reasonable trial strategy, which we will not second-guess. Moreover, we do not believe that defendant suffered the requisite prejudice as a result of his trial counsel's performance. As previously noted, the evidence against defendant was strong and more than sufficient to allow a jury to reasonably conclude beyond a reasonable doubt that he was guilty of the crimes charged. Accordingly, defendant's argument on this issue is without merit.

Finally, defendant argues that his sentence is "excessive" and should be vacated and remanded for resentencing. As defendant notes, we review a sentencing issue for an abuse of discretion. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Here, defendant admits that his sentence falls within the range set by the sentencing guidelines, and therefore, we cannot conclude that the trial court abused its discretion in applying the applicable sentencing guidelines. See *People v Babcock*, 244 Mich App 64, 74; 624 NW2d 479 (2000).

We further find no merit to any of defendant's remaining issues on appeal. Accordingly, defendant's conviction and sentence are affirmed.

Affirmed.

/s/ Michael J. Talbot  
/s/ Helene N. White  
/s/ Christopher M. Murray